IN THE

Supreme Court of the United States

OCTOBER TERM, 1944.

No. .

FIDELITY-PHILADELPHIA TRUST COMPANY, and ROBERT A. WORKMAN, Executors of the Estate of Anna C. Stinson, Deceased,

Petitioners,

v.

WALTER J. ROTHENSIES, Individually and as Collector of Internal Revenue for the First District of Pennsylvania,

Respondent.

PETITIONERS' BRIEF

IN SUPPORT OF PETITION FOR CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE THIRD CIRCUIT NO. 8291.

C. RUSSELL PHILLIPS,
[illegible] WALKER & RHOADS,

INDEX TO BRIEF.

INDEX TO CASES.

BASIS OF JURISDICTION.

Jurisdiction is invoked under Section 240 (a) of the Judicial Code as amended by the Act of February 13, 1925, 43 Stat. 938. The opinion of the Circuit Court of Appeals for the Third Circuit was filed May 15, 1944. The mandate has been stayed until July 29, 1944.

STATEMENT OF THE CASE.

This action is to recover approximately $13,000. of Federal estate taxes on the estate of Anna C. Stinson paid to the Collector pursuant to the Commissioner's deficiency letter and alleged not to be due. The question is whether the assets of a trust valued at $84,433.49 on the date of decedent's death should be included as part of her estate and if so, whether the value of outstanding estates should be deducted. The facts are briefly as follows:

Anna C. Stinson, a widow, died November 17, 1934, at the age of 51. On March 26, 1928, she executed a certain irrevocable trust indenture with the Fidelity-Philadelphia Trust Company and one of her brothers as

trustees and placed under it assets which on the date of her death had a value of $84,433.49 comprising about one-seventh of all she owned. A copy appears at page 7a of the Record. By this trust indenture she reserved the income to herself for life and at her death the income was to go to her two children, Florence and Nancy, during their respective lives, and upon the death of each daughter the corpus was to be distributed to each such daughter's descendants *per stirpes.* There were cross remainders providing that in case either daughter died without leaving descendants the corpus should be added to the other daughter's share. It was then provided that in the event both daughters died without leaving descendants the principal should be paid in such manner as the settlor should appoint by will.

Mrs. Stinson had been left a widow some years before when her husband was killed in a fall. Her older brother, Robert A. Workman one of the plaintiffs, had been advising her in investment matters, and suggested this trust to secure some diversity in the management of her affairs. At the time the trust was created, on March 26, 1928, Mrs. Stinson was 45 years of age and had two daughters aged 10 and 12 years. She was in good health, never having been ill. Her four brothers and sisters were and are all living. The whole family was a long lived one. Yet six and a half years later on November 17, 1934, she died suddenly of heart disease leaving the two daughters, one almost 17 and the other 18 years of age.

Reference to this trust was included on the estate tax return but the assets were not included in the taxable estate. Later the Commissioner assessed a deficiency, which was paid, and this suit subsequently brought by the executors to recover the amount of additional tax arising by reason of the inclusion of the assets of the trust in the estate.

The case was tried before Honorable J. Cullen Ganey in the Eastern District of Pennsylvania on February 16, 1942. Most of the facts were stipulated. The docket entries show the stipulation was filed February 12, 1943. In fact it was offered in evidence at the trial (R. 37a). The practice of the clerk in entering exhibits on the docket only upon appeal is somewhat misleading. In fact this stipulation was before the trial judge.

There is no dispute that when the trust was drawn Mrs. Stinson had these two daughters to whom she gave life estates following her own, and that when she died they were both living. The value of a remainder interest in the trust after their lives had, on the date of Mrs. Stinson's death, a value of 14.030% of the $84,433.49 face value of the assets in the trust, or a value for such a remainder of $11,846.02 (R. 34a). This was stipulated. The remainder, however, could become subject to the power of appointment only in the event the two daughters died without descendants. Evidence was introduced to show that the value of this remote interest on the date of Mrs. Stinson's death was 1.24% of $84,433.49 (R. 53a) or $1,046.97. There was no dispute over this evidence.

The trial court filed its decision January 8, 1943, holding that the transfer was not made in contemplation of death but holding that under Sec. 302 (c) of the Revenue Act of 1926 the trust was intended to take effect at or after the grantor's death. The court expressly concluded that the whole value of the trust assets should be included in the gross estate and made no mention of any reduction by reason of the intervening life estates.

From this decision the executors appealed to the Circuit Court of Appeals for the Third Circuit. That court affirmed by decision rendered May 15, 1944, and this petition for certiorari is filed to that decision

SPECIFICATIONS OF ERRORS URGED.

Petitioners urge the following errors:

(1) The court below erred in holding the trust was intended to take effect in possession or enjoyment at or after death within the meaning of Sec. 302 (c) of the Revenue Act of 1926 as amended.

(2) The court below erred in failing to deduct from the value of the assets of the trust the value of the irrevocable estates of settlor's daughters and of the remainders to their descendants.

SUMMARY OF ARGUMENT.

Petitioners' position is that the retained interest in this trust is so small that it should be disregarded. It was valued at 14% after the death of settlor's two daughters and 1.24% after failure of the whole line. The retained interest materializes, if ever, only when the whole line fails if it does so upon the death of the children.

For gift tax purposes, such a retained interest is held too remote to relieve the transfer from tax. A charitable remainder in such an event is held too speculative to value. It is therefore contended such a diluted interest should not color the whole trust with an intent that it take effect only at or after settlor's death.

Lastly, the Hallock case with its very valuable retained interest included only that retained interest in the taxable estate and excluded all the rest. If anything is included here, only that almost valueless retained interest should be considered.

ARGUMENT.

1. The transfer by this trust does not come within Section 302 (c).

The question considered under this heading is whether or not the transfer in trust of March 26, 1928 comes within

Section 302 (c).* As that Section stood when the trust was created, it read as follows:

> "Sec. 302. The value of the gross estate of the decedent shall be determined by including the value at the time of his death of all property, real or personal, tangible or intangible, wherever situated—
>
> * * * * * * *
>
> (c) To the extent of any interest therein of which the decedent has at any time made a transfer, by trust or otherwise, in contemplation of or intended to take effect in possession or enjoyment at or after his death, except in case of a bona fide sale for an adequate and full consideration in money or money's worth."

Section 302 (c) as it stood on the date of decedent's death on November 17, 1934, is set forth in the margin. The portion thereof appearing in italics was added by the

* Sec. 302. The value of the gross estate of the decedent shall be determined by including the value at the time of his death of all property, real or personal, tangible or intangible, wherever situated, except real property situated outside the United States.

* * * * * * *

(c) To the extent of any interest therein of which the decedent has at any time made a transfer, by trust or otherwise, in contemplation of or intended to take effect in possession or enjoyment at or after his death, *or of which he has at any time made a transfer, by trust or otherwise, under which he has retained for his life or for any period not ascertainable without reference to his death or for any period which does not in fact end before his death (1) the possession or enjoyment of, or the right to the income from, the property, or (2) the right, either alone or in conjunction with any person, to designate the persons who shall possess or enjoy the property or the income therefrom;* except in case of a bona fide sale for an adequate and full consideration in money or money's worth. Any transfer of a material part of his property in the nature of a final disposition or distribution thereof, made by the decedent within two years prior to his death without such consideration, shall, unless shown to the contrary, be deemed to have been made in contemplation of death within the meaning of this title.

joint resolution of March 3, 1931, as amended by the Revenue Act of 1932.

The notes of testimony have been certified notwithstanding they have largely to do with the question of whether the gift was made in contemplation of death. This has been done, because it is felt that the Circuit Court of Appeals as well as the trial judge, have wholly misunderstood the purpose intended to be accomplished by the trust of March 26, 1928.

Section 302 (c) combines in one sentence the two thoughts of gifts in contemplation of death and those intended to take effect in possession or enjoyment at or after death. It is significant that the word "intended" is attached to the clause applicable to gifts intended to take effect in possession or enjoyment at or after death. The application of 302 (c) depends upon the intent of the decedent in this case. Her intent, of course, is primarily to be determined from the instrument itself, but if there is any doubt on the subject the surounding circumstances may have a bearing. For this reason the testimony dealing with those circumstances has been printed.

In her trust (expressly irrevocable) Mrs. Stinson requires the trustees to pay the income to herself for life and thereafter "to pay the said net income in equal shares to Florence V. Stinson and Nancy C. Stinson, daughters of the said settlor, during their respective lives." It was then provided that as each daughter should die her share of the principal should be paid to the daughter's living descendants *per stirpes* absolutely. In the event a daughter died leaving no descendants, her share of principal was to go to the benefit of the other daughter and her descendants. The only reversionary feature in the trust appears in the following provision (p. 15a):

> "* * * in the event of the death of both daughters of said settlor without leaving descendants

surviving, to pay over the corpus or principal of the within created trust estate to such person or persons and upon such estate or estates as the said Settlor shall by her last Will and Testament direct, limit and appoint, and in default of such appointment then to assign, transfer and pay over the said corpus or principal of the within created trust estate to:" the Presbyterian Home for Aged Couples and Aged Men; the Presbyterian Orphanage; the Presbyterian Hospital; Bryn Mawr College; and the Philadelphia Home for Incurables.

Mrs. Stinson retained the life income for herself. If such a trust were written today, doubtless this feature alone would require including the assets at some values as a part of her estate. However, the trust was created March 26, 1928, before Section 302 (c) was amended by the joint resolution of March 3, 1931. At that time the reservation of a life estate in the assets of a trust was not sufficient to make the principal taxable to the settlor's estate. This Court had decided a number of cases to that effect.

May v. Heiner, 281 U. S. 238 (1930).

In this case the settlor provided that the income from the trust should be paid to her husband for life and then to herself for life with remainder to their children. It was held that the principal of the trust was not taxable to the settlor's estate.

Following this decision, two other decisions along the same line were handed down.

Burnet v. Northern Trust Company, 283 U. S. 782 (1931);

McCormick v. Burnet, 283 U. S. 784 (1931).

The day after these two decisions were handed down the joint resolution of March 3, 1931, was adopted, pro-

viding that the retention of income by a settlor made the principal of the trust part of the settlor's estate for estate tax purposes.

It has recently been decided that the joint resolution is not to be given retroactive effect and is not to apply to trusts created before its date of passage.

Hassett v. Welch, 303 U. S. 303 (1938).

In this case the settlor in 1924 created a trust, the income to be paid to himself for life and after his death to certain nephews and nieces, and upon the death of the survivor of them the principal was to be distributed to their living issue. This Court held that Congress did not intend the joint resolution to be retroactive, and this decision was based largely on comments made on the floor of Congress at the time of its passage. The joint resolution was passed under a suspension of the rules. It did not go to any committee for hearing. Therefore, comments upon the floor are the only clue available to the intention of Congress.

Section 302 (c) of the Revenue Act of 1926 was amended by the joint resolution of March 3, 1931, so as to require inclusion of the assets of a trust where the life estate was reserved to the settlor. The section was further amended in 1932 and as amended was retained in the Revenue Act as adopted in 1934. In all of these Revenue Acts there was included a provision taxing a transfer intended "to take effect in possession or enjoyment at or after death". Reservation of a life estate without more does not constitute taking effect at or after death under the statute, according to the decision in May *v.* Heiner.

Therefore, if May *v.* Heiner and the cases following it, including Hassett *v.* Welch, are to be considered law, the circumstance that Mrs. Stinson reserved to herself the income for life must be disregarded as an indication that the trust was intended to take effect at or after death.

After her own death Mrs. Stinson created vested estates in her two daughters for life. They were normal, healthy girls of the ages of 10 and 12 years when the trust was created, and when Mrs. Stinson died in 1934 one of them was almost 17 and the other 18 years of age. They both testified in court. Both are married. One of them had one child and the other two children as of the time of the trial.

There is an absolute gift of the principal of this trust to the descendants of the daughters on the date of the death of each daughter. The death of Mrs. Stinson had no effect at all upon this trust except, of course, the termination of her own life interest which under the decided cases has no bearing. The daughters did not receive their interests by reason of Mrs. Stinson's death. They had them all the time. No reversionary provision in the trust instrument could take them away. The entire fee was disposed of by the trust, and no part of it was retained by the settlor beyond her own life interest.

The contention was advanced before the trial judge and again in the Circuit Court of Appeals, that the whole family might have died out before Mrs. Stinson's death and thus the trust might entirely have failed. Careful thought will indicate that this is not a possibility. Even if the whole family should die out this circumstance would not increase the life estate reserved by the settlor and she would have no power of disposition other than that reserved by way of power of appointment under her will and her failure to exercise the power would leave the entire residue in the four named charities.

This possibility is, therefore, not an actuality. It is an actual fact in this case that under no circumstances whatever could anything ever have come back to this settlor beyond the life estate which she reserved. Once it is determined that May *v.* Heiner and like cases are still the law and that the joint resolution does not apply to this case, it is clear that nothing can render this trust

or any part of it, taxable as part of the settlor's estate unless it be a mere circumstance that she did reserve a power of appointment effective only under very remote possibilities. These possibilities could still occur and whether or not they do occur has no relation whatever to the settlor or to the time of her death.

The Government depends, and the court below relied upon the case of

Helvering v. Hallock, 309 U. S. 106 (1940).

This case will be discussed more at length later on. In it the settlor made a trust for the benefit of his wife, giving her the income for life. It was then provided that if the settlor survived his wife, the principal should come back to him. There was thus no absolute gift of the principal to anyone, and a very real possibility that the husband might survive the wife. Only the husband's death made the estate created by the trust indefeasible.

The case at bar is very different. Here absolute estates have been created to the uttermost limit in this family. Only in the event the whole family dies out can there be any further disposition by the settlor, and even that event does not terminate in any one else any estate created by the trust. Certainly the death of the settlor has no effect one way or the other. If the whole family had died out the settlor would have had a life estate in the income with a power to appoint the principal by will at her death. She would not have received the property back free of the trust. If at some time hereafter the whole family should die out, the principal might become subject to the terms of the decedent's will, but that possibility is extremely remote and is almost valueless. It is now of even less value than it was when the decedent died because there are now several grandchildren which was not the case then.

The contention is now made that the Hallock case should be extended to cover a case where there is any

possibility of control at all no matter how remote. If the Hallock case was intended to have that meaning, it is, of course, no longer possible that a trust *inter vivos* shall ever be excluded from the settlor's estate for tax purposes. It is quite beyond human possibility to create a perfect *inter vivos* trust without any possibility that either the settlor or her will should thereafter at some time control the disposition of the principal.

Let us suppose that Mrs. Stinson provided that in the event her entire family should die out that the fee should go to the United States Government. It is hardly to be supposed that there is any human organization on earth which we would regard as more permanent than the United States Government. Nevertheless, it is conceivable that our Government would not be present or in existence to receive the remainder when it should fall in. There are places on earth today where three years ago this Government held sway and now no longer does, inconceivable as this may seem to a patriotic citizen. As a matter of cold philosophy, it is impossible for a settlor to completely divest himself of any piece of property on trust with one slight exception. In the event the trust were for the sole purpose of destroying the property, it may be imagined that there could be no reverter of any kind. In no other case is it possible to draw a perfect trust and even in that one exception it may be imagined that the trustee might fail to destroy the trust property, and thus a reverter might take place.

The possibility that the reserved power should ever be exercised in the case at bar is about as remote as is to be found in the ordinary human family. Had Mrs. Stinson had ten children instead of two, the possibility would have been even more remote, although it is by no means an established fact that the members of a large family are more likely to perpetuate a family line than are the members of a small family.

The trial judge did not enter into any discussion of his reasons for reaching the result in this case. There is no decided case which thus advances the Hallock case. The Circuit Court of Appeals went to greater lengths to justify its decision. It purports to recognize May *v.* Heiner and the cases following it, but states that it is compelled by the Hallock case to give decision against the taxpayer. It states (R. 86a): "Since the disposition of the estate was held in suspense until her (settlor's) death, that event compels the imposition of the tax." This sentence is of course, quite incorrect. Nothing whatever happened upon the occasion of the decedent's death except the ending of her own life estate and the beginning of the life estates of the daughters. The disposition of the trust estate was not in the slightest affected. No gift which had hitherto been given by the trust was rendered more certain by the death of the settlor. The day after her death the same possibility existed as it did the day before her death, that if the family ultimately dies out the principal may go to charities under the will. This possibility was more remote the day after her death than it was the day before and it becomes more remote as each day goes by because the value of the intervening life estates of the daughters each day becomes less and the absolute disposition to healthy grandchildren day by day becomes more of a certainty.

The decision in the Hallock case is really a decision in five cases. In three of these the decedent created a trust under a separation agreement to pay the income to his wife for life with the provision that if she should die, the property should revert to the settlor if he should be living. In one of the cases the decedent by an antenuptial agreement made the same provision for reversion in the event his wife should predecease him. In the fifth case there was merely a provision in a trust that the income should be paid to the settlor's wife for life and upon her death to the settlor himself if he should be living.

All of these cases contain the common fact that the trust instrument called for a reversion direct to the settlor in the event he survived the life tenant. Only the settlor's death put an end to this reversion, and a majority of this Court held that this circumstance rendered the trust so much like a will that it was intended to take effect and would take effect only upon the death of the settlor, and that under Section 302 (c) some value should be included in the decedent's estate.

However, in each case the settlor did not survive, and at his death there was thus an outstanding life interest in the wife. The Government did not ask that the entire value of the trust assets be included in the estate of the settlor. It sought only to have the value of the remainder included. Only this remainder could have reverted. This question of values will be discussed later on.

The case most nearly identical with the case at bar is

Commissioner v. Kellogg, 119 Fed. (2d) 54 (1941) C. C. A. 3.

In this case the settlor by trust created in 1919, reserved the income for his life and then provided it should go to his wife for life, and upon the death of the survivor the principal was to go to the living children and the spouse of any deceased child. It was then provided that if all the children should die without issue or spouse the principal should go to the next of kin of the settlor.

At the argument it was contended that the gifts to the children were vested. The court held that they were contingent. It was also pointed out that there was a kind of undisclosed possibility of reverter. The settlor in the Kellogg case provided that in the event the children died without issue the principal should go to the next of kin of the settlor. The instrument did not contain any provision as to what should happen if there were no next of kin.

People do die without next of kin, and if there had been none quite obviously the reverter of the principal would have been to the settlor's estate. The draftsman of the instrument in the Kellogg case never thought of such a remote possibility.

Judge Biggs points this out in his opinion, page 57:

> "Upon the estates set up by the indenture of the case at bar, if the grantor had survived his wife, his children, their respective spouses, and their issue, and his own next of kin, the corpus of the trust would have reverted to him likewise by reason of the failure of the trust. In either event the trust would have returned to him not by specific words contained in the indenture, but by failure of the trust * * *. No *inter vivos* trust can ever be made that would not be includible in the grantor's estate for the purpose of taxation if the petitioner's view prevails."

The court declined to overrule May *v.* Heiner and declined to extend the provisions of the Hallock case.

The Kellogg case is substantially identical with the case at bar. There is one possible difference. In the Kellogg case the trust indenture provided that in the event of the failure of the trust the principal should go to the settlor's next of kin. In the case at bar this remote possibility was covered by a provision that if the whole family died out the property should go as the settlor should appoint by will. In the Kellogg case there was no provision as to what should happen if all the provisions of the trust should fail. As the court pointed out, there would be a reverter to the settlor. While the court had no occasion to say so, in the Kellogg case it is clear that if this should have occurred the property would have passed under the settlor's will. In the case at bar Mrs. Stinson said that if there should be a total failure the trust should pass under her will, and then she appointed in her will the four charitable institutions.

The case at bar is quite indistinguishable on any important fact from the Kellogg case because there is no real difference between reserving a power of appointment if the whole line dies out and making no provision whatever under those circumstances, in which condition the settlor would have the power by operation of law.

The Circuit Court of Appeals in the present case states (R. 84):

> "In the case at bar Mrs. Stinson did retain a string or tie, whereby, upon the happening of certain contingencies, she could have regained control of the corpus of the trust at least to the extent of making it subject to testamentary bequests."

It should be said that she could not regain control of the corpus for any other purpose whatsoever under any circumstances. The court then went on to state that the retention of this "string" compelled conclusion of the trust under the Hallock case. The Circuit Court of Appeals distinguished the Kellogg case by a curious and it is submitted, unsound, process of reasoning. It pointed out that when Mrs. Stinson made this trust in 1928 she did not have any grandchildren, whereas in the Kellogg case, the trust was created when there were grandchildren. The court then goes on to state (R. 86):

> "The rights of the beneficiaries other than those of the grantor's daughters could not become absolute until the death of the grantor and had to remain contingent or conditional at least until the happening of that event."

This sentence is completely in error. The death of the settlor had not the slightest effect upon the question of whether or not her grandchildren should receive the absolute remainders given by the trust. The only possible circumstance affecting their right to take is whether or not they shall survive the settlor and their own parents.

These grandchildren were not born when settlor died. Clearly her death did not render their enjoyment more or less certain save only that her death terminated her own life estate, which under May *v.* Heiner and Hassett *v.* Welch, is not a controlling factor. It is submitted that the Circuit Court of Appeals has created for itself a picture of the possibilities which is entirely erroneous and has attributed to the death of the decedent—settlor, an effect which it did not have and never could have.

The Government has contended a number of times unsuccessfully, that the Hallock case overrules May *v.* Heiner. Such cases are:

Helvering v. Proctor, 140 Fed. (2d) 87 (1944), C. C. A. 2;
Helvering v. Washington Trust Co., 140 Fed. (2d) 87 (1944) C. C. A. 2.

These cases were appeals by the Commissioner from the Tax Court. In the Proctor case the decedent executed two deeds of trust in 1923 reserving the income to herself for life, then on her death to divide the principal into two parts, one to her son absolutely, and the other to pay the income to the son for life with remainder on his death to her grandchildren then living per capita. If the son predeceased his mother the trustees were to distribute the principal upon her death among her living grandchildren per capita. If there were none, to the "heirs at law or legal representatives" of her son and daughters. The other deed was in like terms except in favor of a daughter.

In the Washington Trust Company case there were two deeds, one in 1923 and the other in 1929, the income during settlor's life to be paid to "anyone whom I should designate", and upon his death to pay the income to his wife for life "as she may request" and on her death, or his death, if he survived her, to pay the income to his children then living with survivorship in case any child

died without issue. If there were issue, a child's share should go to his issue.

The Circuit Court of Appeals for the Second Circuit discusses at length whether or not the Hallock case reverses May *v.* Heiner and concludes that it was not the intention of this Court to accomplish that result.

New York Trust Company v. United States, 51 Fed. Supp. 733 (1943) Court of Claims.

In February, 1924, the decedent executed an irrevocable trust instrument, reserving the income to herself for life and at her death principal was to be divided into shares, the income to be paid to her three children if living and the principal ultimately to their children appointed by them or their heirs. The action was to recover estate taxes paid by reason of the inclusion of the principal of the trust. The court discussed whether or not May *v.* Heiner and Burnet *v.* Northern Trust Company were overruled by the Hallock case and held that they were not. Full recovery was allowed.

A great deal has been written about whether May *v.* Heiner was properly decided or not. It is not within the province of this brief to go exhaustively into that question. The fact remains that it was decided by this Court in 1930 and represented an interpretation of the tax law which had been widely adopted. Undoubtedly many trusts were set up in reliance upon that doctrine and doubtless some after the decision and before the passage of the joint resolution.

The tax Court also holds that the Hallock case does not overrule May *v.* Heiner.

Bradley v. Commissioner, 1 T. C. 518 (1943).

It has been stated recently by this Court that the gift tax supplements the estate tax. The two statutes are stated to be in *pari materia.*

Estate of Sanford v. Commissioner, 308 U. S. 39 (1939);

Rasquin v. Humphreys, 308 U. S. 54 (1939).

These two cases were gift tax cases. In the Sanford case the settlor created a trust in 1913 before the gift tax statute was passed. In 1924 after the effective date of the gift tax law he renounced a reserved power to modify the trust. Shortly thereafter the settlor died and it was contended that the renunciation was tantamount to a gift.

In the Humphreys case a trust was created in 1934 after the gift tax act of 1932 was imposed and in it he reserved a power to change the beneficiaries and otherwise alter the trust. The Commissioner claimed gift taxes in both cases admitting that he could not succeed in both. This Court held that the retention of the power to change prevented the gift from being complete in the Humphreys case. In the Sanford case it was held that a gift while originally incomplete, became complete upon the renunciation of the reserved power. In referring to the Gift Tax Act Mr. Justice Stone states at page 44:

> "There is nothing in the language of the statute, and our attention has not been directed to anything in its legislative history to suggest that Congress had any purpose to tax gifts before the donor had fully parted with his interest in the property given, or that the test of the completeness of the taxed gift was to be any different from that to be applied in determining whether the donor has retained an interest such that it becomes subject to the estate tax upon its extinguishment at death. The gift tax was supplementary to the estate tax. The two are in *pari materia* and must be construed together. Burnet *vs.* Guggenheim, *supra,* 286. * * *"

A very helpful case is that of

Smith v. Shaughnessy, 318 U. S. 176 (1943).

This case was decided February 15, 1943, and involved the liability of a grantor for gift tax in a case very much

like Helvering *v.* Hallock where the grantor gave certain property upon trust to his wife, with remainder to others, but subject to a provision that if the wife predeceased the grantor, the property should go back to him. The Government conceded that the reverter after a single life could be valued, and this Court held that only the complete gifts should be subject to gift tax. The value of the reversionary interest was to be omitted. While this case is not conclusive, it affords grounds for hopeful expectation that this Court may reaffirm the decision in the Hallock case excluding the value of irrevocable life estates in determining estate tax liability.

Robinette v. Helvering, 318 U. S. 184 (1943).

This case was also decided February 15, 1943, and differs from the Smith case in that the reversion occurred after the death of a daughter without issue. At page 188 this Court distinguishes the Smith case decided the same day:

> "In this case, however, the reversionary interest of the grantor depends not alone upon the possibility of survivorship but also upon the death of the daughter without issue who should reach the age of 21 years. The petitioner does not refer us to any recognized method by which it would be possible to determine the value of such a contingent reversionary remainder. It may be true as the petitioners argue that trust instruments such as these before us frequently create 'a complex aggregate of rights, privileges, powers and immunities and that in certain instances all these rights, privileges, powers and immunities are not transferred or released simultaneously'."

The Court therefore held that the entire trust was taxable **for gift tax purposes**. This was done because the remainder was so small. It is submitted that the converse proposition contended for by the petitioners

here should be accepted, namely, that the whole trust should be exempt from estate tax liability, because the possible reverter is too remote for practical consideration.

Humes v. U. S., 276 U. S. 487 (1928).

In this case the question was whether a remote charitable remainder could be valued so as to be used as a deduction for estate tax purposes. The will gave one-half of the residue to trustees for a niece to pay the income to her and to pay the principal in portions at the age of 30 and 35 years, and the balance upon reaching the age of 40. The other half was given in trust for a brother in the same way. It was provided that if the beneficiaries should die without issue before the age of 40, the balance was to go to the charities. The Court of Claims held that it was possible to value these remainder interests but this Court in an opinion by Justice Brandeis reversed. At page 494 he states:

> "Neither taxpayer, nor revenue officer—even if equipped with all the aid which the actuarial art can supply—could do more than guess at the value of this contingency. It is clear that Congress did not intend that a deduction should be made for a contingent gift of that character."

Taking the gift tax cases and the Humes case together, the following comments are in order. The reserved right to dispose of the property in the trust in the case at bar could be effective only in the event the entire family should die out.

On the date of the decedent's death this was an extremely remote possibility. There were almost 99 chances out 100 that it would not happen at all. In the Humes case under similar circumstances a remote charitable bequest was held too remote for consideration and therefore, no deduction was allowed. In the gift tax cases the

reserved power frees the subject of the gift from liability for gift tax and leaves it exposed to the estate tax but if the reserved power is very remote it will be disregarded. This happened in the Robinette case.

It is most respectfully and earnestly submitted that a contingency too remote to be considered for the purposes of a charitable deduction; too remote to be considered an element in escaping the gift tax, should likewise be considered too remote to expose the principal of the trust to estate tax liability under the Hallock case.

The Tax Court has decided a number of cases recently wherein a remote possibility of reverter has been held not to bring the assets of a trust within the rule of the Hallock case.

> **Estate of Lester Hoffheimer, 2 Tax Court No. 99, (1943);**
> **Estate of Mabel H. Houghton, 2 Tax Court No. 110, (1943);**
> **Estate of Ellen Portia Goodyear, 2 Tax Court No. 112 (1943);**
> **Estate of Tully C. Estee v. Commissioner, T. C. Memorandum (P-H Memorandum Service, Par. 43,420) (1943);**
> **Estate of Smith M. Flickinger, T. C. Memorandum (P-H Memorandum Service, Par. 43,455) (1943).**

The basic reason for these cases is given in the Hoffheimer case at page 16 of the opinion:

> "In the instant case not the death of any beneficiary or beneficiaries in being, but the complete failure of decedent's whole line would alone work a reversion in him under the terms of either trust. In neither trust is the vesting of the remainder . . possession, by final determination of the individual or class which should take, made with reference to decedent's death."

The situation in the case at bar is exactly the same. Whether or not Mrs. Stinson's will shall finally dispose of the principal of the trust (to charities) depend not at all on her own death, but on the failure of the line in the future. It can still happen.

2. If the transfer is to be included the value of the outstanding estates should be deducted.

As previously indicated, the decision of the trial judge and the affirming decision of the Circuit Court of Appeals purport to be based entirely on the Hallock case. It is interesting that in the Hallock cases the entire value of the trust assets was not included for estate tax purposes. In every one of those decisions the first life estate was outstanding at the time of the death of the settlor. The Commissioner, in the first instance, included the full value of trust corpus in each deficiency notice and on appeal a reduction by the amount of the value of the outstanding life estate was conceded on pages 2, 6 and 7 of the Government's brief and the deficiency as finally computed by the Board of Tax Appeals allowed a reduction by the life estate.[1]

---

[1] The writer of this brief has not checked this result from the Board records, but relies upon the assertion of Everett in an article entitled Valuation of a "Possibility of Reverter" under the Hallock Case, as reported in 18 Taxes 611, 612 (1940). In view of the concession in the Government's brief on appeal there would appear to be no doubt of this.

One of the cases covered by the opinion in the Hallock case was No. 399, Bryant *v.* Helvering. The facts of it are discussed at page 116 of the Hallock decision. That trust provided for payment of the income to the wife during her life and upon her death "to the said grantor, if he should survive her". The wife survived the husband and the question was what effect the trust should have upon his gross estate. Mr. Justice Frankfurter states at page 116:

> "* * * The Board of Tax Appeals allowed the Commissioner to include in the decedent's gross estate only the value of a 'vested reversionary interest', which the Board held the Grantor had reserved to himself. On appeal by the taxpayer the Circuit Court of Appeals sustained this determination."

At the end of Mr. Justice Frankfurter's opinion, on page 122, there appears the following as the last words of his opinion:

> "In No. 399, the judgment is affirmed."

There would seem to be no doubt that in the Hallock case this Court affirmed the principle that only the reversion could be included in the gross estate. Only the reversion was subject to return to settlor, and it was only the reversion which passed beyond the reach of the settlor or his estate by the accident of his death before that of the life tenant.

Following the Hallock decision the Treasury Department amended the Regulations. This amendment took the form of Treasury Decision 5008, approved September 19, 1940, amending Regulation 80 (1937 Ed.). It is long and the portion of it applicable to the subject of valuation is as follows:

> "* * * Thus, upon a transfer by a decedent of property in which an estate for life is given to one

and an estate in remainder to another, but with a provision added that the estate in remainder shall revest in the decedent should he survive the owner of the life estate, there is to be included, in determining the value of the decedent's gross estate following his death, the value as of the date of his death of the estate in remainder, if the life estate is then outstanding. The value of the outstanding life estate is not to be included in determining the value of the gross estate, unless that estate had been transferred in contemplation of the decedent's death, or otherwise as to render it a part of the gross estate * * *."

It would seem that the highest authority in the administrative branch of the Government, namely the Secretary of the Treasury, by whom the Regulations are promulgated, has decided that only the interest retained by the decedent should be valued.

The foregoing Regulation still stands as the opinion of the Secretary of the Treasury as to how the gross estate is to be determined in this respect, and the Regulation says that the value of the outstanding life estate is not to be included. In the Hallock case the value of the life estate was not included and in the Regulation the Treasury Department says it is not to be included. What higher authority on the subject could be secured, it is difficult to say.

Nevertheless in the case at bar the Government has contended for the inclusion of the entire value of all of the assets in the trust on the date of Mrs. Stinson's death. Judge Ganey deliberated on the case for eleven months, and his opinion does not disclose any consideration of this point.

The Circuit Court of Appeals, after rejecting the petitioner's contention for deduction of the value of the other outstanding assets, assigned its reason in the fol-

lowing sentences which are the sole explanation of its action:

> "Since the disposition of the estate was held in suspense until her death that event compels the imposition of the tax. The rights of the beneficiaries, other than those of the grantor's daughters, could not become absolute until the death of the grantor and had to remain contingent or conditional at least until the happening of that event."

It is of course, true that so long as the settlor lived no one else could enjoy this trust estate. That circumstance, however, does not render the trust a part of the settlor's taxable estate under May *v.* Heiner and Hassett *v.* Welch. Therefore, the mere ending of the settlor's life estate and the beginning of the next estate is not a critical factor. The Hallock case seems to indicate, and the regulations state, that "the value of the outstanding life estate is not to be included in determining the value of the gross estate * * *". There has been no time from the creation of the trust to the present moment when some life estate was not outstanding. Up to the time of the settlor's death her own life estate was outstanding and during that time it had a very substantiial value based on her life expectancy. The moment she died the life estates of her two daughters began and they have been outstanding ever since. Petitioners submit that the value of the life estates of the daughters ought to be deducted. If they are, this reduces the value of the principal to 14.030% which gives a value of $11,846.02 under the joint life table supplied by the Commissioner and stipulated in this case. The succeeding estates in remainder to the descendants of the children are not presently in a state of enjoyment. Petitioners submit that they are "outstanding". It is further submitted that even if the word "outstanding" as used in the regulations, refers only to an estate in course of enjoyment, then the regula-

tion is in error because there is no real reason for deducting the value of the estate presently being enjoyed and not the next succeeding estate or estates which will follow upon its determination without recourse to anything the settlor ever did other than create the trust and die.

If the value of the remainders in the descendants of the two daughters is deducted, residual value is 1.24% of the trust of $1,046.97. This represents the opinion of the witness as to the value of Mrs. Stinson's power of appointment when she died leaving two living daughters.

It is respectfully submitted that this Court should not go beyond the rule laid down in the Hallock case, and should not override the regulations. Other cases on the subject are of interest.

Bradlee v. White, 31 Fed. Supp. 569 (1940), D. C. Mass.

This, like the case at bar, was an action to recover estate taxes paid by reason of the inclusion of the entire value of a trust in the decedent's gross estate. The decedent in this case created a trust in 1922, giving the income to his wife and upon her death the trust to revert to the grantor if he survived her, but if he did not, the trust was to go to the children. This case was almost the same as the Kellogg case on its facts and the court held that the value of the remainder interest held by the decedent should be included in his gross estate.

The court at page 570 states the question, which was presented on an agreed statement of facts, as follows:

> "The question is, therefore, whether the remainder interest should have been included in the gross estate of the deceased. * * *"

In view of these and many other cases where the Government has taken the position that only the remainder interest should be included in the gross estate, and in view of the Regulation expressly to that effect, it is sub-

mitted that the Government should not be permitted now to assert that its own regulation and the cases as well are mistaken.

It is respectfully submitted that a petition for certiorari should be granted.

C. Russell Phillips,
Montgomery, McCracken, Walker & Rhoads,
Attorneys for Petitioners.

1421 Chestnut Street,
Philadelphia 2, Penna.